BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2015-290-C – ORDER NO. 2016-__

JANUARY __, 2016

In the Matter of the Petition of the South Carolina Telephone Coalition for a Determination that Wireless Carriers are Providing Radio-Based Local Exchange Services in South Carolina that Compete with Local Telecommunications Services Provided in the State	)))))))	**ORDER DENYING PETITION**

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This matter comes before the Public Service Commission of South Carolina ("Commission") pursuant to a Petition ("Petition") filed by the South Carolina Telephone Coalition and its individual member companies ("SCTC") on August 11, 2015, seeking "a determination that carriers who offer retail wireless services in South Carolina are providing telecommunications services in South Carolina, and that they are providing radio-based local exchange services in this State that compete with local telecommunications service provided in this State." The Petition was filed pursuant to S.C. Code Ann. § 58-9-280(E)(3) and Commission Regulation 103-825.

The Commission's Docketing Department instructed the SCTC to publish a prepared Notice of Filing, one time, in newspapers of general circulation statewide. The Notice of Filing described the nature of the Petition and advised all interested persons desiring to participate in the scheduled proceedings of the manner and time in which to file appropriate pleadings for

inclusion in the proceedings as a party of record. SCTC filed Affidavits of Publication demonstrating that the Notice of Filing had been duly published.

Petitions to Intervene were filed on behalf of United Telephone Company of the Carolinas d/b/a CenturyLink ("CenturyLink"), Windstream South Carolina, LLC and Windstream Nuvox, LLC ("Windstream"), the South Carolina Cable Television Association ("SCCTA"), Frontier Communications of the Carolinas, LLC ("Frontier"), BellSouth Telecommunications, LLC d/b/a AT&T South Carolina ("AT&T South Carolina"), CTIA- The Wireless Association ("CTIA"), and FTC Communications, LLC and FTC Diversified Services, LLC ("FTC"). The South Carolina Office of Regulatory Staff ("ORS") is a party of record pursuant to statute. Each party other than CTIA supported the Petition, and those parties are collectively referred to in this Order as the "Proponents."

On September 28, 2015, CTIA filed a Motion to Dismiss Petition, Or, in the Alternative, Expand Scope of Proceeding, and To Suspend Case Schedule ("Motion to Dismiss"). On October 2, 2015, the SCTC filed a Response to CTIA's Motion to Dismiss. On October 7, 2015, CTIA filed a Reply to the SCTC's Response to CTIA's Motion to Dismiss. On October 9, 2015, the SCTC filed a Response to CTIA's Reply. Also on October 9, 2015, the CTIA requested that the Commission grant oral argument on CTIA's Motion to Dismiss. On October 12, 2015, the SCTC filed a Response to CTIA's request for oral argument on its Motion to Dismiss. On October 14, 2015, the Commission issued Order No. 2015-757 which (1) delayed consideration of CTIA's Motion to Dismiss until the merits hearing in this Docket and denying CTIA's request for a separate hearing on the Motion to Dismiss; (2) denied CTIA's request to expand the scope of the proceeding; and (3) denied CTIA's request to suspend the case schedule in this Docket.

On November 3rd and 4th, 2015, the Commission, with Chairman Nikiya "Nikki" Hall presiding, heard the matter of the Petition at the Commission Hearing Room located at 101 Executive Center Drive in Columbia, South Carolina. SCTC was represented by John M. Bowen, Esquire, Margaret M. Fox, Esquire, Charles L.A. Terreni, Esquire, and Bradley S. Wright, Esquire. CenturyLink was represented by Scott Elliott, Esquire and Jeanne W. Stockman, Esquire. Windstream was represented by Burnet R. Maybank, III, Esquire. SCCTA was represented by Frank R. Elllerbe, III. Frontier was represented by C. Joanne Wessinger Hill. AT&T South Carolina was represented by Patrick W. Turner. CTIA was represented by John J. Pringle, Jr. FTC was represented by William E. Durant, Jr., Esquire. ORS was represented by Jeffrey M. Nelson, Esquire and Andrew M. Bateman, Esquire.

SCTC presented the testimony of Larry Thompson (direct and rebuttal), Emmanuel Staurulakis (direct and rebuttal), Douglas Duncan Meredith (direct and rebuttal), and H. Keith Oliver (direct and rebuttal). Mr. Oliver also offered his testimony on behalf of Home Telephone ILEC, LLC. CenturyLink presented the testimony of Alan Lubeck (direct). Windstream presented the testimony of Betty J. Willis (direct). Frontier presented the testimony of Susan A. Miller (direct). CTIA presented the testimony of Don Price (direct and surrebuttal). FTC presented the testimony of Frank Bradley Erwin (direct). ORS presented the testimony of Christopher J. Rozycki (direct).

II. SUMMARY OF TESTIMONY

Mr. Thompson testified that similarities between wireline and wireless telecommunications services include service territory, end user experience, and network similarities. Mr. Thompson compared coverage maps obtained from the websites of Verizon

Wireless, AT&T, Sprint and T-Mobile with a map showing the service territories of the SCTC member companies, to conclude that the four largest wireless carriers provide "reliable voice communications" within SCTC member company service territories.

Mr. Staurulakis testified that wireless service competes with wireline local exchange offerings because 1) the availability of wireless voice service offerings due to the fact that the wireless networks of the major wireless carriers interconnect with the wireline networks of the SCTC members; 2) the number of telephone number blocks requested by, and provided to, wireless carriers in the SCTC member service areas; 3) the annual loss of access line connections and local service revenues experienced by SCTC members; 4) the fact that Verizon Communications and AT&T have recognized the impact of wireless competition on their wireline operations; and 5) the fact that other states require wireless carriers to contribute to state universal service funds.

Mr. Meredith also used coverage maps obtained from the websites of Verizon Wireless, AT&T, Sprint and T-Mobile to support his opinion that wireless telephone services compete with local telecommunications service in South Carolina. Mr. Meredith also testified that consumers use wireless service as a substitute for wireline telephone service, based upon survey data from the Centers for Disease Control and Prevention's ("CDC") National Center for Health Statistics ("NCHS"), the Federal Communications Commission's ("FCC") Local Competition Report, and information from Verizon's and AT&T's Form 10-K reports.

Mr. Oliver testified about the benefits and importance of the USF, and the benefits he believes wireless carriers receive from "universally available landline service." Mr. Oliver testified that wireless providers compete with Home Telephone based on the following: 1) a decline in Home Telephone's landline accounts; 2) the presence of wireless towers, wireless

carrier retail stores and wireless provider advertising in Home Telephone's service area; 3) the existence of interconnection agreements between wireless service providers and Home Telephone; and 4) the acquisition of blocks of telephone numbers in Home Telephone's service area by wireless providers; and 5) personal knowledge of customers dropping landline service or choosing wireless service instead of landline service.

Mr. Lubek, in addition to citing the FCC Local Competition Report, provided a chart from Centris showing CenturyLink's declining "voice market share." (Record, p. 305).

Ms. Willis testified (Record pp. 320-335) that Windstream provides "voice service," which includes local and long distance services to residential and business customers in seven exchanges in South Carolina. Ms. Willis further testified that wireless service competes with Windstream's voice service in the seven Windstream exchanges, based upon 1) wireless towers, retail stores and wireless carrier advertising in or near those areas; 2) interconnection agreements between Windstream and wireless carriers; 3) number porting from Windstream to wireless carriers; 4) number blocks assigned to wireless carriers in Windstream's service area; 5) access line loss; and 6) Ms. Willis' determination that AT&T wireless service is available in the seven Windstream exchanges based upon her search on the AT&T website. (Record p. 323, l.7- p. 327, l.9).

Ms. Miller's testimony also made reference to the CDC's report on wireless substitution and the FCC's Local Competition Report.

Mr. Price testified that the Commission must use the Subsection (E)(3) framework and the Subsection (G)(1) test to evaluate competition, and that the other parties have not presented evidence to meet those specific criteria. Mr. Price also explained the policy reasons why wireless carriers should not be required to pay into the USF, and how Subsection (E)(3) and (G)(1)

demonstrate the General Assembly's intent that a particular showing of competition is required in order to require wireless carriers to pay into the USF. Mr. Price also testified that wireless carriers already pay SCTC members to use their networks, through the purchase of backhaul circuits and through the exchange of traffic via interconnection agreements.

Mr. Erwin testified that FTC CLEC and FTC Wireless pay into the USF, the former as a competitive local exchange carrier (CLEC) and the latter as an eligible telecommunications carrier (ETC). FTC CLEC and FTC Wireless support the SCTC's Petition.

Mr. Rozycki also made reference to the FCC Local Competition Report in offering his opinion that wireless competition in South Carolina justifies requiring wireless carriers to pay into the USF. (Hearing Exhibit 8).

III. APPLICABLE LAW

The following provisions of S.C. Code Ann. § 58-9-280 are pertinent to the Commission's consideration in this Docket:

S.C. Code Ann. § 58-9-280(E): The purpose of the state USF as defined by the General Assembly is "continuing South Carolina's commitment to universally available basic local exchange telephone service at affordable rates . . . ."

S.C. Code Ann. § 58-9-280(E)(2) ("Subsection (E)(2)"): The commission shall require all telecommunications companies providing telecommunications services within South Carolina to contribute to the USF as determined by the commission.

S.C. Code Ann. § 58-9-280(E)(3) ("Subsection (E)(3)"): The commission also shall require any company providing telecommunications service to contribute to the USF if, after notice and opportunity for hearing, the commission determines that the company is providing private local exchange services or radio-based local exchange services in this State that compete with a local telecommunications service provided in this State.

S.C. Code Ann. § 58-9-280(G)(1) ("Subsection (G)(1)"): Competition exists for a particular service if, for an identifiable class or group of customers in an exchange, group of exchanges, or other clearly defined geographical area, the service, its functional equivalent, or a substitute service is available from two or more providers.

IV. DISCUSSION

Because there was some disagreement among the parties with respect to the particular statutory provisions to be applied by the Commission in evaluating the Petition, as a preliminary matter we are called upon to address the statutory framework and the test for competition the Commission must apply in this case:

A. Subsection (E)(3), and Not Subsection (E)(2), Frames the Issue for the Commission's Consideration

The General Assembly authorized the Commission generally to require all "telecommunications companies" to contribute to the USF, but provided a separate, specific standard for wireless carriers, and providing that wireless carriers only must contribute if their services compete with a local telecommunications service. Subsection (E)(2) states the general requirement that "telecommunications companies" contribute to the USF:

> (2) The commission shall require all telecommunications companies providing telecommunications services within South Carolina to contribute to the USF as determined by the commission.

Subsection (E)(3) creates another test for wireless carriers, which qualifies and operates as an exception to Subsection (E)(2). The plain language of Subsection (E)(3) describes how the Commission's determination must be made for a company providing "radio-based local exchange services" (i.e., wireless services):

> (3) The commission also shall require any company providing telecommunications service to contribute to the USF if, after notice and opportunity for hearing, the commission determines that the company is providing private local exchange services or radio based local exchange services in this State that compete with a local telecommunications service provided in this State.

Accordingly, rules of statutory construction require the Commission to apply Subsection (E)(3) (a more specific statutory provision applicable particularly to wireless carriers) here rather than

Subsection (E)(2) (a more general provision addressing the same subject). *See Spectre v. SC DHEC*, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) ("[w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect").

Applying Subsection (E)(2) and ignoring Subsection (E)(3) effectively writes Subsection (E)(3) out of S.C. Code Ann. § 58-9-280 and would violate the rule of statutory construction requiring that all words of a statute be given effect. *See Ballard v. Ballard*, 314 S.C. 40, 443 S.E.2d 802 (1994) (Court is constrained to avoid construction that would read provision out of statute). If the broader test in Subsection (E)(2) applied to wireless carriers, it would swallow the exception or qualifier in Subsection (E)(3), and render its language surplusage and its effect meaningless. *See CFRE v. Greenville County Assessor*, 395 S.C. 67,74, 716 S.E.2d 877, 881 (2011) (Statute must be read so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.").

Additionally, we are persuaded by CTIA's additional arguments that Subsection (E)(3) applies in this case. Notably, the language of S.C. Code Ann. § 58-9-576(A)(3) and S.C. Code Ann. § 58-11-100, and the Revised Notice of Filing in this Docket reference Subsection (E)(3) but make no mention of Subsection (E)(2).

Finally, the Commission has previously recognized that Subsection (E)(3) is the appropriate framework to be followed in determining whether wireless carriers must contribute to the USF. *See, e.g. Proceeding to Establish Guidelines for an Intrastate Universal Service Fund*, "Order Issuing Declaratory Ruling," Order No. 2006-335 issued in Docket No. 1997-239-C, July 3, 2006 at Page 3 ("While the General Assembly has given the Commission the

opportunity pursuant to S.C. Code Ann. § 58-9-280(E)(3) and (9) to include wireless and broadband revenues within the Fund . . . .").

B. The Commission Will Apply the Test Set out In Subsection (G)(1)

Subsection (E)(3) requires the Commission to determine whether a wireless carrier's services "compete" with a local telecommunications service, but does not define that term. The only test in Section 58-9-280 for whether one service competes with another is provided in Subsection 58-9-280(G)(1):

> (G)(1) Competition exists for a particular service if, for an identifiable class or group of customers in an exchange, group of exchanges, or other clearly defined geographical area, the service, its functional equivalent, or a substitute service is available from two or more providers.

The Commission applies this test in this case, for several reasons. First, the Commission must use a test crafted by the Legislature[1] rather than developing its own test or using a test suggested by the parties, especially because the Subsection (G)(1) test is in the same section of the Code (S.C. Code Ann. §58-9-280) as Subsection (E)(3). In addition, the Legislature's adoption of S.C. Code Ann. § 58-9-576(A)(3) also reflected its intent that the test in Subsection (G)(1) must be applied to this case. S.C. Code Ann. § 58-9-576(A)(3) provides that a determination that a LEC qualifies for alternative regulation does not constitute a determination whether a wireless carrier must contribute to the USF "under Section 58-9-280(E)(3) ***or (G)(1)***." (emphasis added). Finally, the Commission previously considered Subsection (G)(1) when, relying on the testimony of

[1] For this reason, the Commission rejects Mr. Ellerbe's suggested approach. (Record 68). Mr. Ellerbe's approach would exceed the Commission's authority.

Commission Staff witness Gary Walsh, it determined that wireless carriers should not be required to contribute to the USF in Docket No. 97-239-C.[2]

C. Subsections (E)(3) and (G)(1) Require Granular Review

Subsections (E)(3) and (G)(1) require the Commission to use specific, exacting standards when evaluating competition between a wireless carrier's services and a local telecommunications service provided by a LEC. Subsection (E)(3) requires the Commission to determine whether the wireless carrier's services compete with "a local telecommunications service." Under Subsection (G)(1), competition exists for a particular local telecommunications service if the wireless carrier makes "the service, its functional equivalent, or a substitute service" available to "an identifiable class or group of [the LEC's] customers" residing in "an exchange, group of exchanges, or other clearly defined geographical area." Because these standards are mandated by statute, the Commission must apply them and may not change or ignore them. *See Porter v. SCPSC*, 335 S.C. 157, 164, 515 S.E.2d 923, 926, (1999) (Commission required to apply factors enumerated in statute in order to determine whether competition exists).

The Proponents' witnesses asked the Commission to change or disregard the statutory criteria so the Commission can make a determination that competition exists. This the Commission cannot do. *See Ballard v. Ballard*, 314 S.C. 40, 443 S.E.2d 802 (1994) (Courts are

[2] *See* Prefiled Direct Testimony of Gary E. Walsh, p.9, l.23 – p.10, l.5; Tr. Vol. IV, p. 1128, Docket No. 97-239-C (July 17, 2000) ("Walsh Testimony") ("[U]nder §58-9-280(G), the legislature has provided specific criteria that must be met to determine whether or not a wireless service competes with a local exchange service."); *See also* Commission Order No. 2001-419 at 21.

is constrained to avoid construction that would read provision out of statute). The South Carolina Supreme Court has not hesitated to reverse this Commission when it failed to apply statutory criteria and instead relied upon supposed expert testimony provided by one or more parties. *See South Carolina Cable Television Ass'n v. Pub. Serv. Comm'n*, 313 S.C. 48, 437 S.E.2d 38 (1993). The Commission must therefore apply Subsections (E)(3) and (G)(1) rigorously to ensure that it dutifully carries out the Legislature's intent. Each aspect of the applicable statutory criteria is described below.

1. For each LEC, the particular local telecommunications services alleged to be in competition with a wireless carrier's services must be identified

Subsection (E)(3) provides that a wireless carrier may be required to contribute to the USF only if the Commission determines that its services "compete with a local telecommunications service provided in this State." Subsection (G)(1) requires the Commission to make its determination of "competition" with respect to a "particular service," in this case a particular local telecommunications service. Any "particular service" is necessarily defined (and indeed distinguished from any other "particular service") by its rates, terms and conditions. Title 58 and the Commission's Rules explicitly recognize the importance of rates, terms and conditions in evaluating a particular service. In fact, each of the members of the SCTC who have elected alternative regulation under S.C. Code Ann. § 58-9-576(B) have been required by S.C. Code Ann. § 58-9-576(B)(6) to "file tariffs . . . for its local exchange services that set out the terms and conditions of the services and the rates for these services." (Emphasis added). Perhaps even more crucially, the very same statute explicitly identifies, the "rates, terms, and conditions" of particular services as being subject to a statutory determination of reasonableness. S.C. Code Ann. § 58-9-576(B)(2) ("on the date a LEC notifies the commission of its intent to

elect the plan described in this section, existing rates, terms, and conditions for the services provided by the electing LEC contained in the then-existing tariffs and contracts are considered just and reasonable.") (emphasis added). It is clear, therefore, under South Carolina law, that every particular local exchange service has rates, terms and conditions associated with it that are an integral part of that service.

As a result, the Commission must be presented with evidence concerning the rates, terms and conditions of a particular local telecommunications service offered by a LEC so it can determine (as required by Subsection (G)(1)) whether the services of a wireless carrier provide the same service, a functional equivalent or a substitute service. For example, a local telecommunications service may be provided on a standalone basis, in a package in which other services are separately priced, on in a bundle in which all services are offered for a single price. *See, e.g.* S.C. Code Ann. §§ 58-9-280(I), 58-9-285. The rates, terms and conditions for such services, packages and bundles vary by LEC, so the Commission's analysis necessarily must be conducted on a LEC-by-LEC basis.

SCTC urged the Commission to disregard this statutory criterion in several ways. First, it asked the Commission to make its determination for the wireless industry as a whole rather than considering each wireless carrier individually. Petition at Page 1. This position conflicts with the plain language of Subsection (E)(3), which requires the Commission to make its determination with respect to "any company" providing wireless services. Second, SCTC argued that the Commission may determine whether wireless services compete with LECs' "voice" services without regard to whether the voice services are local telecommunications services. (Meredith, Record p. 197; Oliver Rebuttal, Record p. 104, ll 15-16: "However, the

question before the Commission is much simpler. It is as simple as whether the average South Carolina consumer sees his wireless phone as a valid substitute for his landline phone when making a voice call."). This position flatly contradicts Subsection (E)(3), which requires that the Commission decide whether a wireless carrier's services "compete with a local telecommunications service . . . ." (emphasis added). SCTC's contention that the question is simply what the average South Carolina customer perceives ignores the fact that Subsection (E)(3) obligates the Commission to make a finite finding and, as the Petitioner, SCTC bears the burden of proof. This is immutable and SCTC cannot satisfy the burden of proof through witness testimony or legal arguments stating misstating the legal standard. By failing to define the "local telecommunications service" with which it alleges wireless carriers compete, SCTC failed to satisfy the burden of proof.

Third, SCTC claims that the Commission does not need to consider the rates, terms and conditions of particular services offered by LECs. (Staurulakis, Record, p. 177, ll. 7-8.) This position conflicts with the requirement in Subsection (E)(3) that the Commission consider whether competition exists with "a local telecommunications service" (emphasis added) and the requirement in Subsection (G)(1) that the Commission evaluate whether "[c]ompetition exists for a particular service" (emphasis added). The Commission cannot evaluate a particular local telecommunications service and determine if that particular service is subject to competition if none is identified and described.

By way of example, the SCTC's failure to identify any "particular service" that may be subject to competition contrasts starkly with the Commission's consideration of competition in another Docket that considered whether a "particular service" was subject to competition

pursuant to S.C. Code Ann. § 58-9-585. In Docket No. 1995-661-C, AT&T Communications of the Southern States, LLC sought alternative regulation of certain business services, and identified those particular services offered in its Private Line Services Tariff, Custom Network Tariff, and Consumer Card and Operator Services tariffs. *See Order Addressing Request for Alternative Regulation*, Order No. 95-1734, Docket No. 95-661-C, Issued December 15, 1995. While S.C. Code Ann. § 58-9-585 and S.C. Code Ann. § 58-9-280(G)(1) are not identical and do not mandate the same test for competition, the fact that the former required that all such "particular services" be identified in order for the Commission to consider whether competition existed demonstrates even more clearly why the SCTC's failure to do so in this case does not satisfy the directives in Subsections (E)(3) and (G)(1).

2. <u>For each LEC, an identifiable class or group of customers for its local telecommunications service subject to competition by a wireless carrier's services must be specified</u>

Subsection (G)(1) requires the Commission to consider whether the wireless carrier's services compete for an "identifiable class or group of customers" for the particular local telecommunications service in question. For example, competition might exist for residential customers, small business customers or large business (enterprise) customers. SCTC and other parties failed to provide evidence at this level of granularity to support their contention that competition was taking place for all telecommunications customers. (Meredith, Record p. 197, ll. 7-12: "Really, any customer that pays for voice telecommunications service provided by a landline or wireless provider are customers that are experiencing the marketplace where there is competition statewide. And this is a select and identifiable group of customers.") The statute does not permit parties to omit evidence of this criterion.

3. For each LEC, the exchange, group of exchanges or other clearly defined geographical area where the alleged competition is taking place must be specified

Subsection (G)(1) requires the Commission to determine the geographic area where the alleged competition is taking place. This showing must be made at a granular level – "an exchange, group of exchanges, or other clearly defined geographical area." In the context of a request for alternative regulation, the issue of geographic scope is important so the Commission can determine the extent to which deregulatory relief will be granted. Likewise, in the context of a request to make a wireless carrier contribute to the USF, the issue is important for determining the extent of the wireless carrier's contribution obligation. In both cases, competition must be shown throughout the geographic area in question. It is not permissible to designate a large area and obtain relief based on a showing of competition in only a portion of it.

SCTC claimed that the entire state of South Carolina is a "clearly defined geographic area" and that the Commission can make a determination that competition exists if it finds competition in any part of the state. (Meredith Direct, Record p. 203, ll. 15-24; Oliver Rebuttal, Record p. 110, ll. 16-20). This test has no basis in the statute. The geographical requirement in Subsection (G)(1) would make no sense if the area identified had nothing to do with the area where competition was actually taking place. It also conflicts with the requirement, discussed above, that the Commission conduct its analysis for each LEC's local telecommunications services, which only are offered in each LEC's service area, and not throughout the entire state of South Carolina. SCTC's position again conflicts with the clear terms of the statute.

4. Each LEC must demonstrate that the services made available by the wireless carrier are the functional equivalent of the LEC's local telecommunications service or a substitute for the LEC's local telecommunications service

Subsection (G)(1) requires the Commission to determine whether a wireless carrier's services are the functional equivalent of, or a substitute for, a LEC's particular local telecommunications service. SCTC and the other parties misstated the requirements for proving these criteria.

To determine whether one service is the functional equivalent of the other, the two services must be described and compared, which involves a detailed analysis of their rates, terms and conditions of service. For example, if one particular service includes local calling only, while another provides local and long distance calling, the two services do not provide equivalent functionalities. SCTC attempted to avoid this sort of analysis, asserting that all that must be shown is that LECs and wireless carriers provide service that enables customers to make telephone calls to one another. (Thompson Testimony, Record pp. 248-249). SCTC made no effort to compare all the functionalities of a LEC's local telecommunications service and the services provided by a wireless carrier. SCTC thus failed to provide the kind of evidence that is necessary for the Commission to reach a determination of functional equivalence.

Similarly detailed analysis is required to determine whether one service is a substitute for or a functional equivalent of another in a particular geographic area. As a starting point, the Commission must compare the rates, terms and conditions of the two services. For example, evidence that one service costs $10 per month and the other costs $50 would be a strong indication that they are not perceived as substitutes for one another in the market. (Price Surrebuttal Testimony, Record p. 422). The Commission also would consider market evidence that customers are purchasing one service instead of the other in the specified geographic market,

which would provide direct evidence that they are substitutes. SCTC and the other parties did not provide either type of evidence.

C. The Proponents' Evidence Fails to Satisfy the Criteria of Subsections (E)(3) and (G)(1)

As the Petitioner, SCTC bears the burden of proof in this Docket. *Leventis v. SCDHEC*, 340 S.C. 118, 530 S.E.2d 643 (2000) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. It is also a fundamental principle of administrative proceedings that the burden of proof is on the proponent of a rule or order, or on the party asserting the affirmative of an issue."). *See also* In Re: Petition of AT&T Communications of the Southern States, Inc. Requesting Alternative Regulation of Certain Services in South Carolina, Order No. 95-1734 in Docket No. 95-661-C issued December 15, 1995 ("[T]he Commission concludes that AT&T has not met its burden of proof as described under the statute with regard to any of its services.").

The Commission must determine "competition" based solely upon the applicable statutory requirements and those facts in evidence applicable to those criteria. *See South Carolina Cable Television Association v. SCPSC*, 313 S.C. 48, 53, 437 S.E.2d 38, 41, (1993) ("The fact that one is authorized to compete is not evidence that it does, in fact, compete."). Consequently, although SCTC and the parties supporting the Petition offered a large amount of testimony and documentary evidence, that evidence simply does not satisfy the criteria in Subsection (G)(1) that the General Assembly requires the Commission to apply.

The Proponents' evidence falls into two categories: (i) evidence intended to show that wireless services are the functional equivalent of wireline services; and (ii) evidence intended to

show that wireless and wireline services are substitutes. Proponents' evidence failed to address or satisfy the statutory criteria.

1. The Proponents' functional equivalence evidence fails to meet the statutory criteria

SCTC witness Thompson testified that wireless and wireline services are functionally equivalent because their networks overlap, they provide a number of similar functions that enable customers to make telephone calls, and they have similar networks. (Record pp. 246-251). This evidence fails to meet the requirements of Subsections (E)(3) and (G)(1). As a preliminary matter, Mr. Thompson spoke only in general terms without identifying particular wireless or local telecommunications services, classes of customers or clearly defined geographical areas. Because he did not compare any particular wireless service with any particular local telecommunications service, he failed to account for many functional differences that exist between particular services. For example, wireless carriers typically provide all-distance services, while local telecommunications services by definition are more limited in scope. Mr. Thompson, however, did not distinguish between local services offered on a standalone basis and those offered as part of telecommunications service packages or bundles with broadband and video services. Moreover, Mr. Thompson did not consider critical functionalities that many wireless services offer that local telecommunications services do not, including mobility, Internet access, mobile apps, and texting capabilities, to name just a few. Based on these differences alone, it is clear that the services provided by smartphones today cannot be considered functionally equivalent to local telecommunications service. Mr. Thompson's analysis failed to account for these differences, and the Commission may not disregard them.

2. The Proponents' substitute service area evidence fails to meet the statutory criteria

Most of the evidence concerning alleged wireless substitution concerns statewide or regional developments, but in a few instances LECs provided evidence specific to their service areas. Neither set of evidence meets the criteria of Subsections (E)(3) and (G)(1).

a. National, statewide and regional evidence

The Proponents offered evidence that certain wireless carriers are operating in South Carolina. This evidence included coverage maps and testimony concerning wireless towers, wireless retail stores, advertising, interconnection agreements, number blocks acquired by wireless carriers, number porting and circuits obtained by wireless carriers to transport their traffic. (Oliver, Record p.81-82; Staurulakis, Record pp. 152-154; Meredith, Record pp. 204-207; Thompson, Record pp. 246-248). They also provide national or statewide evidence that while LECs' access lines have been decreasing over time, wireless subscriptions have been increasing. Such evidence includes Centers for Disease Control data concerning household use of wireless and wireline services, FCC Local Competition Reports, SCTC member access line trends, and AT&T's and Verizon's 10-K reports. (Meredith, Record pp. 194-196. 214-216; Thompson, Record pp. 263-266; Rozycki, Hearing Exhibit Eight; Staurulakis, Record p. 154).

Such evidence is geared to the test created by the Proponents rather than the statutory test the Commission must apply. This evidence fails to meet the statutory test in Subsections (E)(3) and (G)(1), because it does not concern any particular local telecommunications service provided to a specified class of customers in any clearly defined geographical area. The Proponents' national, statewide and regional evidence thus fails to provide the Commission with the information it needs to assess whether a particular wireless service is a substitute for a particular

local telecommunications service and, if so, the geographic area where that substitution is taking place. Because this evidence provides no proof concerning whether and where the statutory criteria have been met, it must be disregarded.

b. LEC-specific evidence

Home Telephone, CenturyLink and Windstream attempted to provide evidence regarding wireless competition in those LEC service areas. This evidence generally concerned the existence of wireless towers, retail stores and advertising in their service areas; number block acquisition; number porting; interconnection agreements; the availability of wireless service; and access line loss. None of the LEC witnesses presenting this testimony, however, identified a particular local telecommunications service with which competition was alleged, by itself a fatal defect. The witnesses also generally failed to identify the classes of customers receiving a particular telecommunications service or the geographic extent of the competition in their service areas.[3] Their evidence therefore fails to meet the statutory test.

D. Public Policy Supports a Rigorous Approach When Determining Whether Wireless Carriers Must Contribute to the USF

Public policy supports the rigorous analysis required by Subsections (E)(3) and (G)(1). Indeed, the Commission received 9,500 protests from South Carolina consumers expressing concern that their wireless charges would be increased if wireless carriers are required to contribute to the USF. Higher wireless charges are of particular concern in South Carolina, which has the eighth lowest median income, and poor customers here are more likely to rely on

[3] Windstream witness Willis made a passing attempt to identify classes of customers (residential and business) and stated, based on a web search, that AT&T provides service in each of Windstream's exchanges.

their cell phones as their sole means of voice service and Internet access. (Price, Record p. 376, ll. 1-7.) It also makes no sense to charge growing technologies like wireless in order to support older technologies that are losing customers, which discourages innovation and dampens economic and job growth. (Price, Record p. 376, ll. 8-12.) Moreover, providing such subsidies to one group of providers at another's expense runs counter to South Carolina's pro-market policies. (Price, Record p. 376, ll. 13-16.)

The General Assembly's cautious approach also makes sense because wireless carriers already pay wireline carriers handsomely for the use of their networks, through payments for backhaul circuits and interconnection arrangements. (Price, Record p. 376, ll, 19-25, p. 377, ll. 1-15) For backhaul circuits alone, wireless carriers pay at least $16 million per year, an amount equal to more than 50% of USF funding. (Price, Record p. 377, ll. 1-5.) The Proponents must make the specific showing required by Subsections (E)(3) and (G)(1) before they can be awarded USF funds from wireless carriers in addition to the considerable funds the record indicates they already receive from wireless carriers.

IT IS THEREFORE ORDERED THAT:

1. SCTC's Petition is denied in its entirety, as the record does not show that the requirements of S.C. Code Ann. § 58-9-280(E)(3) and S.C. Code Ann. § 58-9-280(G)(1) have been met in this case.

2. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

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Nikiya "Nikki" Hall, Chairman

ATTEST:

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Swain E. Whitfield, Vice-Chairman